(19)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1077

ALBERT I. CASSELL, *Petitioner*,

v.

HOWARD UNIVERSITY, A CORPORATION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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Petitioner, Albert I. Cassell, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered December 1, 1941, reversing the judgment of the District Court of the United States for the District of Columbia on the verdict of a jury, in favor of petitioner, for $19,687.50. The Court of Appeals remanded with instructions to the District Court to dismiss petitioner's suit.

THE OPINIONS BELOW.

The opinion of the District Court (R. 1143) has not been reported. The opinion of the Court of Appeals (R. 1659) is not yet reported.

JURISDICTION.

The decision of the Court of Appeals was entered December 1, 1941 (R. 1659). A petition for rehearing was filed December 15, 1941 (R. 1668) and denied January 3, 1942 (R. 1669). The jurisdiction of this Court is invoked under Sec. 240 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

Petitioner filed suit in the District Court against respondent, Howard University, a corporation, to recover for services rendered on an extension program of respondent, involving collections and expenditures under the supervision, direction and control of petitioner of sums in excess of $1,000,000 and acquisitions, rentals and management of realty holdings valued at $1,000,000. After a four weeks trial, the jury returned a verdict in favor of petitioner for $19,687.50. After verdict, the *only* motion filed by respondent was a motion for a new trial which was overruled by the District Court. The District Court entered judgment in favor of petitioner on the verdict. Respondent appealed. The Court of Appeals reversed, but instead of affirming or remanding for a new trial, as respondent had filed no motion under Rule 50(b) of the Federal Rules of Civil Procedure to set aside the verdict and for a judgment in respondent's favor, instructed the District Court to dismiss petitioner's suit.

The questions presented are:

(1) Whether there was sufficient evidence to sustain the verdict.

(2) Whether the ground on which the Court of Appeals relied, viz. the statute of limitations, was actually before

that court for determination. Petitioner contends that this ground was abandoned or waived by respondent or it was estopped to assert the statute.

(3) Whether the Court of Appeals invaded petitioner's Constitutional right of trial by jury of disputed facts.

(4) Whether the Court of Appeals correctly interpreted the evidence.

(5) Whether the Court of Appeals correctly construed Rule 50(b) of the Federal Rules of Civil Procedure and erred in dismissing the cause instead of affirming or remanding for a new trial.

STATUTE, CONSTITUTIONAL PROVISION AND RULE INVOLVED.

(a) Statute involved.

The Act of March 3, 1901 (31 Stat. 1389, Ch. 854), Title 12, Sec. 12-201 [24;341] of the District of Columbia Code, 1940 Edition, reads in part:

> "No action * * * shall be brought after three years from the time when the right to maintain such action shall have accrued: * * *"

(b) Constitutional provision involved.

Amendment VII to the Constitution of the United States reads:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

(c) Rule involved.

Rule 50(b) of the Federal Rules of Civil Procedure reads:

"RESERVATION OF DECISION ON MOTION. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within ten days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

STATEMENT.

Petitioner filed suit on June 4, 1936 (R. 1), against respondent, a corporation, operating a university, for $26,250 as compensation for purchasing, supervising the purchase, managing, renting, and supervising the rental of numerous parcels of realty, preparing plans, maps, charts, reports, keeping records and other duties, in connection with the "Twenty Year Extension Program" of respondent. The physical development aspects of the plan involved the extension of respondent's university grounds and facilities. That extension involved the preparation and execution of a plan for the acquisition of approximately 300 parcels of improved and unimproved real estate adjacent to respondent's university grounds. The first phase of the acquisition program involved the purchasing, rental and management of 195 parcels of real estate, valued in excess of $1,000,000, and collec-

tions and expenditures covering thousands of items and more than $1,000,000.

Petitioner's suit was in three counts: count 1 for the reasonable value of petitioner's services (R. 1); count 2 for the express amount agreed to be paid to petitioner (R. 3); and count 3 for recognized and ratified value of petitioner's services (R. 5). Respondent's only defense material to this application is the statute of limitations. The trial before a jury, commenced February 19, 1940 (R. 40) and concluded March 18, 1940 (R. 1620). The jury returned a verdict of $19,687.50 in petitioner's favor, judgment was entered thereon and respondent appealed. The Court of Appeals reversed on the theory petitioner's extension work ended April 21, 1933, hence his suit, filed June 4, 1936, was too late under the District three year statute of limitations.

Petitioner's contract, its formation, and duties performed thereunder prior to and after June 4, 1933.

Petition's evidence proved the following facts:

In 1927 petitioner, an architect and engineer skilled in technical and educational extension activities (R. 40-42), prepared architectural plans for a women's dormitory at Howard University (R. 43). That dormitory, though plans were drawn, was not constructed and was abandoned in favor of the long-time plan, which contemplated five women's dormitories (R. 43). The money for the women's dormitories "came from the Federal Government." Thus "* * * in the course of * * * discussions with the National Capital Park and Planning Commission and the National Fine Arts Commission * * * it became apparent that Howard University because of * * * limited area * * * could not continue to be developed in a haphazard manner * * *, and it could not continue merely to ask for appropriations of Congress (R. 44).

A large conference was "held at the Department of Interior * * * attended by the trustees of Howard University * * * members of the sub-committees of Congress"

charged with "the oversight of appropriations for the Department of the Interior * * * some of the philanthropic boards interested in the development of Howard University" and by petitioner (R. 44). The result was that in 1929 Howard University stopped "immediate physical expansion" to "spend time in the careful planning of the University for * * * 20 years" (R. 44, 45). Respondent's Board of Trustees decided upon locating and constructing on "the main campus * * * academic buildings," "a scientific quadrangle" and "residences for men and women * * *" (R. 45). Thus was born respondent's "Twenty-year Plan" involving extensive real property acquisitions for expansion purposes. Respondent's "trustees then authorized" petitioner "to make the drawings and specifications * * *." Petitioner prepared a massive drawing of the plan (R. 46, 47). Maps of the proposed acquisitions involved in the plan were prepared by petitioner at the request of respondent's president (R. 58).

Petitioner set up the land acquisition plan in written form "prepared a detailed survey (R. 59), "the arguments in writing for this survey * * * "to go to the proposed donors of funds for purchasing 'extension' properties and, on the president's (of respondent) suggestion, letters" for the president (R. 59) to sign. "Using those surveys as a basis, the University secured first the $600,000 from the General Education Board and the Julius Rosenwald Foundation, and later $300,000 more for the same purpose" (R. 61). Surveys were made by petitioner for and accepted by respondent's Board of Trustees (R. 61).

On June 29, 1929, with $600,000 of the donated $900,000 available for land acquisitions, respondent's president thanked petitioner for his "helpful and efficient services in connection with the development of the project for the purchase of additional land," stated petitioner's tabulations of facts, drawings and counsel had been of invaluable assistance to respondent's trustees and requested "in further pur-

suance of the land purchase project" (R. 62, 63) a plan of operation from petitioner. Petitioner prepared a plan in writing for the further procedure to be taken. Petitioner detailed to respondent's president,[1] petitioner's plan and procedure for the carrying on of the land acquisition program (R. 64, 65). Petitioner had previous experience in such matters (R. 67) which was known to respondent (R. 68). A detailed survey prepared by petitioner showing his plan was accepted by respondent (R. 60, 61).

After petitioner submitted a plan of acquisition (R. 63, 66) to effectuate the purpose of the accepted survey (R. 60, 61), respondent's president came to petitioner's office and petitioner, upon invitation, went to the president's house for repeated conversations on "extension activities" (R. 98). Conversations started early in 1929 (R. 98). Respondent requested petitioner to head the extension program, coordinate it and agreed to pay him at the rate of $7500 a year (R. 93, 99). Petitioner was then taken by respondent's president (and chief executive officer) "to the first meeting of Howard University Trustees Committee on Extension" (R. 99). Full powers to act had been conferred by respondent on that committee (R. 108). That committee employed petitioner as "agent to represent the University" (R. 99, 100, 101, 104, 322).

Petitioner's plan to acquire 300 parcels of real estate was adopted and he was employed as respondent's agent to complete those acquisitions (R. 59, 100). That employment was not denied by the members of respondent's appointing committee. All members of that committee, including respondent's president, admitted petitioner's appointment as agent for the entire length of the acquisition program. Mr. Hawkins (a trustee of respondent and secretary of respondent's extension committee) certified

[1] Petitioner over a number of years had obtained contracts with the United States to do work at Howard University and had contracted with the University to do maintenance and other work through its president (R. 74, 86, 87). Petitioner's many contracts at Howard University with respondent "were worked through the president" (R. 790).

(R. 322) that petitioner was employed as agent "to represent the University in * * * purchasing property". Mr. Pope (president of Munsey Trust Co., a trustee of respondent, a member of respondent's executive and extension committees) testified (R. 1105) petitioner was employed "as agent to work out the extension program" and that he, Mr. Pope, "had no knowledge of any revocation of Mr. Cassell's authority". Mr. Deyber (vice-president of Second National Bank, a trustee of respondent, a member of respondent's executive and extension committees) testified (R. 1107) that "Howard University had appointed Cassell as agent to represent the University in purchasing property" and Cassell "so acted * * * as active agent." Respondent's president testified (R. 1212) that petitioner was "Agent of the Howard University Extension Fund" and was to "serve as liaison person between the three enlisted operators and the committee". Respondent's president admitted (R. 1213) petitioner was authorized to negotiate for extension properties for respondent, including the Brown, Cook and *Miller* tracts and for lands of the District and Federal Governments (R. 1215), keep the records, make reports, prepare maps and plans, collect rents, receive rents, control rental funds, make monthly reports, serve as liaison officer, (R. 1212), hold the budget (R. 1212), instruct and direct the real estate men (R. 1212), "make progress reports" and pay off mortgages totalling $72,000. (R. 1215). Properties (testified respondent's president) were to be purchased through petitioner and he was to obtain from "the chairman of the committee * * * money, either to bind the purchase or complete it" (R. 1212). As petitioner was to obtain money of respondent from the Second National Bank in large amounts, he was appointed agent to officially represent respondent (R. 1213).

Clearly, from the evidence, petitioner was employed by respondent as its agent to complete the land acquisitions for the extension program, *which continued and was going on in 1933, 1934 and 1935* (R. 1467, 1468).

Petitioner's evidence proved a specific time when he was to be paid under his indivisible contract of employment, (at the rate of $7500 per annum), viz. "when the project was substantially cleaned up" (R. 410). Payment was not due until the extension activities were substantially completed R. 417).[2]

While certain administrative changes (without being brought to the knowledge of petitioner) occurred, concerning the conduct by respondent of the extension activities, the extension activities *continued* (R. 1109, 1110). The evidence showed petitioner's duties, under his contract with respondent, included not only the management of acquired properties and the keeping of records but the following: (1) negotiations with landowners, including *Miller,* Cook, Evans and officials representing the United States and the District of Columbia; (2) collaboration with the auditors of the donors and respondent in preparing audits, records, tabulations, accounts and reports; (3) preparation of sur-

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[2] As the evidence showed an indivisible contract of employment, and that petitioner's extension work under that contract continued beyond June 4, 1933. "* * * the statute of limitations begins to run when and only when the services are terminated or the work completed, although the work may consist of numerous parts or items, and although the contract provides that the compensation shall be made at stated intervals or in installments." See 37 C. J. Limitations, Sec. 175, p. 823 and cases cited in Notes 26, 27 and 28. When services are continuous, though interrupted, limitations do not run against any part of the cause of action. *In re Olfield,* 158 Iowa 98, 138 N. W. 846. The theory being that the statute begins to run in the absence of an agreement to the contrary, when the work is completed and not sooner, for the promise to pay continues up to the time the work is finished. *Hornblower* v. *George Washington University,* 31 App. D. C. 64; *Daniel* v. *Drury,* 50 App. D. C. 107, 267 F. 751.

The evidence also showed that the contract in question fixed the time of payment "when the project has been substantially completed" or when "cleaned up." In such a situation the rule is "where a contract of employment provides for compensation when the work shall be completed, the employee's cause of action * * * accrues at the completion of the work, and the statute begins to run * * * from that time." *Shafer* v. *Pratt,* 79 App. Div. 447, 80 N. Y. S. 109; *Amies* v. *Wesnofske,* 255 N. Y. 156, and see authorities cited p. 161; *Knouse* v. *United States,* 88 C. Cls. (U. S.) 595.

Neither the respondent nor the Court of Appeals questioned these principles. Respondent's contention *on appeal,* which the Court of Appeals erroneously adopted, was that petitioner *completed* his work on extension on April 21, 1933, yet the evidence was to the contrary and respondent *conceded to the trial court* that petitioner worked on extension *after June 4, 1933* (R. 1126, 1127, 1583, 1584).

veys, plans, blueprints, charts, maps and arranging for necessary approvals of Federal and District agencies; (4) dealings with the various banks and persons handling extension funds; (5) dealings with sub-agents, Mr. Muir, the Munsey Trust Company, Mr. Knouse and respondent's auditors.[3]

(1) *Negotiations with landowners.* The uncontradicted evidence is that petitioner was to negotiate with property owners as a part of his contract. His first assignment was to acquire under Plan 1 and 2 some 195 of the 300 parcels of land to be acquired (R. 1117). The District Court held this evidence was undisputed (R. 1117). Respondent's president conceded this and testified petitioner was authorized to negotiate with landowners, including Dean *Miller* (R. 1213). Properties negotiated by petitioner totalled $250,000. Petitioner carried on negotiations for the *Miller* tract, a $40,000 extension transaction, "beginning in 1932 * * * and ending sometime after March, 1934" (R. 181). Those negotiations are described in detail at R. 181. Negotiations *after June 4, 1933* were conducted with the Finance Committee of respondent (which succeeded to the powers and duties of the respondent's Trustee Committee on Extension), respondent's chairman of its Board of Trustees, respondent's chairman of its Finance Committee and respondent's president (R. 181, 182, 188, 189, 190, 191, 192, 193, 194, 200, 204, 205, 206, 207, 209, 211).

(2) *Collaboration with respondent's auditors.* The undisputed evidence was that petitioner prepared all reports, tabulations, daily blotters and records for respondent upon which the auditors of the donors and respondent based their audits (R. 284-290, 1105-1107). Petitioner and Mr. Pope

[3] Respondent contended on appeal that petitioner's extension duties ended as of April 21, 1943, and the Court of Appeals took that view and *on that basis alone* remanded the case to the District Court with instructions to dismiss petitioner's suit. But petitioner's evidence showed that his duties under his indivisible contract of employment did not end on April 21, 1933, but continued thereafter beyond June 4, 1933, and respondent conceded this to be "the fact" to the District Court (R. 1126, 1127, 1583, 1584).

(respondent's trustee) testified petitioner performed extension auditing work, assisted respondent's agents, trustees and auditors into the year 1933 *through July, 1933* (R. 287, 288, 289, 290, 293, 813, 846, 1013). Petitioner reported in writing to respondent's auditors *on June 22, 1933* (R. 997, 999). *Respondent's counsel conceded at the trial that the evidence of Mr. Pope established those facts (R. 1126, 1127, 1583, 1584.)*

(3) *Preparation and approval of extension surveys, maps and plans.* One of petitioner's duties as agent on extension was to prepare and secure proper approvals of surveys, maps and plans concerning the extension program (R. 179, 180, 291, 292, 293, 498, 499). The maps were requested by respondent's president and chairman of its extension committee (R. 181, 306) who commended them (R. 180). *After June 4, 1933,* petitioner continued his extension map and survey work (R. 303, 304). Petitioner prepared a large blueprint of the extension program, and secured, as agent for respondent, *on November 3, 1933,* the official approval of that blueprint by the Commission of Fine Arts and, *on November 20, 1933,* by the Department of the Interior (R. 304). Those approvals were received after discussions, conferences and meetings *in 1933,* between representatives of the Commission and the Interior Department, and petitioner as respondent's agent on extension (R. 304, 305).

(4) *Dealings with banks.* One of petitioner's conceded duties was the actual depositing and managing of extension funds, particularly funds in the Munsey Trust Company. Petitioner and Messrs. Pope, Byrne and Bitterly of the Munsey Trust Company all testified petitioner performed such duties *in 1933.* Mr. Pope testified petitioner worked *with* him on such matters *and with respondent's auditors through June and July, 1933* (R. 1105). Mr. Byrne testified petitioner's account (Trust No. 203) of the extension fund was not closed out *until August, 1933* (R. 1102).

(5) *Dealings with respondent's sub-agents.* One of petitioner's duties was to direct and deal with the sub-agents employed on extension activities. The evidence is replete with transactions of this character *beyond June 4, 1933.* (R. 458, 464, 467, 474, 288, 289, 290, 1104, 1105, 1106, 1107, 1109, 291). Petitioner, Messrs. Pope, Byrne, Bitterly and Deyber, all testified petitioner was the agent in charge of all sub-agents and throughout the extension activities collaborated with respondent's auditors on extension matters. The undisputed evidence was that this very work continued *after June 30,* and *through July, 1933* (R. 1105, 1106, 1102, 1584). Petitioner testified in detail about his duties on extension with respondent's sub-agents (R. 284, 285, 286, 287) and that as a part of his regular extension duties, he worked under instructions of respondent's officers and trustees, *up through the summer of 1933* with such agents (R. 287, 288, 289-291). *Respondent's counsel at the trial conceded that to be "the fact"* (R. 1126, 1127, 1583, 1584). The work performed by petitioner for respondent *after June 4, 1933,* is summarized at R. 808-810.

The District Court held that petitioner's evidence would have to be disputed by respondent before an issue would arise under the statute of limitations (R. 1144, 1146). When faced with petitioner's evidence at the trial, respondent abandoned any attempt to dispute it, *conceded that evidence showed extension work after June 4, 1933,*[4] and, in effect, abandoned its contention that petitioners' claim was barred by the statute of limitations (R. 1126, 1127, 1583, 1584).[5] Clearly the Court of Appeals erred in reversing and dis-

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[4] Petitioner's suit was filed June 4, 1936.

[5] Respondent did not file any motion under Rule 50(b) to set aside the verdict and enter judgment n. o. v. for respondent. Respondent's only motion after verdict was for a new trial (R. 36-37), which did not assert any ground based on the statute. Grounds not presented are waived under Rule 19 of the Rules of the District Court (supplementing the Federal Rules of Civil Procedure). That rule reads in part: "All grounds for motions not stated in a motion * * * shall be regarded as waived * * *." Rule 50 of the Federal Rules requires specific grounds for all motions after verdict."

missing petitioner's suit on the theory petitioner's extension work ended *on April 21, 1933.*

Respondent's conduct after January, 1933, estopped if from relying on the statute. On April 22, 1933, respondent received from petitioner a report on extension management to December, 1932. The Court of Appeals held that petitioner's extension activities ceased on that date. But the evidence, conceded by respondent to be true, was to the contrary.

On April 24, 1933, petitioner was advised by the chairman of respondent's Board of Trustees that petitioner's report and letter requesting compensation were being referred "to the Chairman of the Committee on Buildings and Grounds for such action as he thinks proper" (R. 347). Mr. Crawford, a trustee of respondent, was chairman of the Committee on Buildings and Grounds (R. 347). Petitioner presented his claim to Mr. Crawford (a lawyer and vice-chairman of respondent's Board of Trustees), who had been authorized to take such action as he thought proper (R. 363, 347). Mr. Crawford approved petitioner's claim, advised him not to become impatient, not to enter suit, that his claim was just and "would be paid" (R. 364). By letter in 1940, Mr. Crawford confirmed his ruling in 1933 (R. 740), stating it was notorious that petitioner had been "badly treated" and that he (Mr. Crawford) had ruled petitioner was "entitled to compensation for work done in connection with the so-called extension plans." Relying upon Mr. Crawford's ruling, petitioner waited until May 24, 1934, and, when payment was not forthcoming, called that fact to respondent's attention (R. 350).

In May, 1933, Dr. Flexner, chairman of respondent's Board of Trustees, informed petitioner "not to worry," that the whole matter would be settled to petitioner's "satisfaction" and petitioner "would be paid" (R. 357). That statement was partially confirmed by letter (R. 358). Later, as petitioner was *still unpaid,* he *agreed* with Dr. Flexner to arbitrate (R. 360, 362). In disregard of its agreement to

arbitrate, respondent instead *appointed a committee comprised entirely of its trustees* to consider and settle the matter with petitioner (R. 362, 363). Full power was conferred on that committee, headed by Dr. Tobias, to settle petitioner's claim (R. 362, 363). On December 5, 1934, Dr. Flexner again promised petitioner that he would be dealt with justly and fairly (R. 371). *But it was not until January 3, 1935, that petitioner was advised by Dr. Tobias* of his appointment as chairman of a special committee to adjust petitioner's claims (R. 372, 373). While protesting this method of "arbitration" thus forced upon him, petitioner on January 10, 1935, *agreed* to submit his claim and be bound by the decision of Dr. Tobias' committee (R. 373, 374). Due to circumstances beyond petitioner's control, (R. 376-381) he was not able to *go to New York* to submit his claims to Dr. Tobias' Committee, until October 21, 1935. On October 21, 1935, petitioner submitted his claim in detail. On October 22, 1935, petitioner spent three and one-half hours before Dr. Tobias' Committee *in New York*. After a full hearing (R. 395-438) that committee, which had been empowered to settle petitioner's claim, speaking through its chairman, Dr. Tobias, with all other members and respondent's president present, ruled in favor of petitioner and held that petitioner "would be paid" (R. 438). Petitioner returned to Washington expecting to be paid in accordance with the ruling of the Tobias Committee. When he heard nothing from that Committee, he sought information (R. 439). Thereafter petitioner heard from respondent's president (R. 439).

Petitioner *still* having received *no* compensation *agreed* to a *third* arbitration on November 14, 1935 (R. 440, 441). Petitioner's attempts to have the third "arbitration" carried out were without success (R. 442-446). Respondent's president then informed petitioner verbally that "arbitration" was *"optional"* with the president (R. 446). Petitioner then sought information from other sources and in 1936, secured a copy of a minute of respondent. That minute

(R. 447) showed respondent's Board of Trustees had sent a *"mandate"* to its president and executive committee ordering arbitration of petitioner's claims. Obviously, respondent's president was deliberately misleading petitioner as the mandate of the board was fully known to the president when he told petitioner that "whether or not I settle by arbitration is optional with me." (R. 878-880.)

Petitioner also agreed by telephone with respondent's president to arbitrate *again* (R. 451). But nothing happened. Petitioner next inquired of respondent's secretary as to the reason for failure of respondent to pay him (petitioner) after the Tobias Committee had ruled that he would be paid (R. 451). And it was not until February, 1936, petitioner learned that the Tobias Committee had been dissolved (R. 452, 453). Still mindful of his third agreement to arbitrate (entered into with respondent's president), petitioner waited further. When no definite action could be obtained from the president, petitioner sought information from Dr. Tobias and Mr. Crawford (R. 455), who, up to June, 1936, advised petitioner "to exhaust every means of settling * * * before filing suit." Petitioner followed their advice and continued to negotiate for arbitration under his agreement with respondent's president (R. 456) "right up to the minute suit was filed * * *" (R. 456).

The conduct of respondent, acting through its authorized trustees and officers, is summarized at R. 878-880. A plainer case for the application of estoppel in pais is inconceivable. As the undisputed evidence showed that petitioner's services were worth as much as $50,000 (R. 1115, 1119) the whole record shows that substantial justice was done, hence the verdict and judgment of the District Court should have been affirmed (R. S. 726; Title 28 U. S. C. A., Sec. 391).

STATEMENT OF POINTS AND ERRORS TO BE URGED.

The Court of Appeals erred:

(1) In determining there was insufficient evidence to support the verdict.

(2) In construing the evidence.

(3) In basing its reversal upon the question of the statute of limitations: (a) By incorrectly construing the evidence pertaining to this issue, (b) in applying the statute which was not involved in the appeal or which had been waived or abandoned by respondent, or because respondent was estopped to assert the statute.

(4) In weighing the evidence and deciding disputed facts contrary to petitioner's Constitutional right of trial by jury.

(5) In construing Rule 50(b) of the Federal Rules of Civil Procedure.

(6) In dismissing the cause instead of affirming the decision or remanding the case for a new trial.

REASONS FOR GRANTING THE WRIT.

1. *Petitioner should be protected in his Constitutional heritage to have disputed issues of fact decided by a jury.* Certiorari has been granted for this reason. *Stewart* v. *Southern R. Co.*, — U. S. —, 86 L. Ed. 548, 549. The right of trial by jury in suits at common law is protected by Amendment VII to the Constitution. As we view the evidence, the factual issue of the nature and character of petitioner's contract of employment with respondent went to the jury. The Court of Appeals' opinion rested entirely on the theory that petitioner's case was barred by the statute of limitations. That issue was raised only by a motion of respondent for a directed verdict at the close of petitioner's evidence (R. 1120-1146), which motion was renewed and submitted without argument at the close of the evidence (R. 1583). After verdict, respondent filed no motion for judgment n. o. v. until Rule 50(b).

The rule that, on a motion for a directed verdict, the evidence must be construed most favorably to the plaintiff who is entitled to every legitimate inference that can be drawn

from the evidence[6] was brushed aside by the Court of Appeals. That court considered certain items of written evidence, *ignored all of the oral testimony and facts conceded by respondent,* and held no *single* item of evidence was sufficient to support the verdict. We submit that this procedure was a direct invasion of petitioner's Constitutional right of trial by jury of disputed facts. The question before the Court of Appeals was not what other inferences could be drawn from petitioner's evidence, oral as well as written, but whether there was *any* evidence which tended to support petitioner's case. No statute of the United States nor the Rules of Civil Procedure give the Court of Appeals or the District Court "any part of the exclusive power of a jury to weigh evidence and determine contested issues of fact—a jury being the Constitutional tribunal provided for trying facts in the courts of law." *Berry* v. *United States,* 312 U. S. 450; *Conway* v. *O'Brien,* 312 U. S. 492.

We submit that the factual issues posed by the evidence were for the jury and not an appellate court. The District Court recognized that the situation was factual and discussed it in overruling respondent's motions for a directed verdict (R. 1144-1146, 1583, 1584). The Court of Appeals discussed some of the work performed by petitioner on extension after June 4, 1933, but by some strange quirk held that *each* specific item would not toll the statute. The proper approach is to consider whether *all* the evidence tolls the statute. As the matter was factual and necessarily a jury question, the argument of the Court of Appeals in its opinion is beside the point. The Court of Appeals, because of a statement in a letter to Dr. Flexner, that petitioner had "completed" his connection with a certain aspect of the program, held his work had ended. But the Court of Appeals entirely disregarded other testimony in the case

[6] *Speirs* v. *District of Columbia,* 66 App. D. C. 194, 85 F. (2d) 693; *S. S. Kresge Co.* v. *Kenney,* 66 App. D. C. 274, 86 F. (2d) 651; *Fleming* v. *Fisk,* 66 App. D. C. 350, 87 F. (2d) 747; *Carusi* v. *Schulmerick,* 69 App. D. C. 76, 98 F. (2d) 605, cert. den. 305 U. S. 645; *Jackson* v. *Capital Transit Co.,* 69 App. D. C. 147, 99 F. (2d) 380, cert. den. 306 U. S. 630.

concerning that very statement (R. 733-735), and evidence that petitioner worked beyond June 4, 1933 on extension, which fact respondent conceded (R. 1583, 1584). Moreover petitioner had performed auditing work and worked with respondent's auditors every six months for over three years and throughout June, July and August of 1933 he did that same work. Certainly what petitioner did as a part of his duties in 1929 through 1933 shows a course of conduct and duties from which the jury could find the work performed after June 4, 1933 was but a part of petitioner's extension work.

In discussing other items of evidence, the Court of Appeals brushed aside all extension work performed after June 4, 1933 not withstanding that *the undisputed evidence was that the work was done as a part of petitioner's extension duties.* In fact the Court of Appeals ignored much of the written testimony and all of the oral testimony and conceded facts.

We submit that the Court of Appeals directly invaded the constitutional right of petitioner to have disputed issues of facts weighed and determined by a jury and so departed from established judicial procedure as to require the exercise of this Court's power of supervision.

2. *An authoritative interpretation by this Court of subdivision (b) of Rule 50 of the Federal Rules of Civil Procedure is necessary in the public interest. At the close of petitioner's evidence* respondent moved for a directed verdict raising the contention that petitioner's claim was barred by the statute. As petitioner's evidence at that time disclosed an indivisible contract to work on extension and work under that contract by petitioner throughout June, July and August 1933 (R. 287, 291, 813, 848, 1013), it followed that the statute did not commence to run until petitioner's work was completed. As the respondent conceded to the trial court, that petitioner's extension work was being carried on after June 4, 1933, the trial court held that no

issue under the statute was presented until petitioner's evidence was disputed by respondent (R. 1144).

At the close of all the evidence respondent renewed its motion for a directed verdict. Respondent was unable to point out any change in the evidence tending to show a factual situation different from that existing at the close of petitioner's evidence. Hence, while the motion was renewed, it was not argued as respondent desired no argument (R. 1583). On the renewal of respondent's motion the trial court informed respondent that if it would point out any conflicting evidence on the question of whether petitioner completed his work under his contract by June 4, 1933, the trial court would give alternative instructions to the jury on the question of whether or not the facts showed that the statute had run. *At the time respondent stated to the trial court that it had no testimony to offset petitioner's testimony and that it was accepting petitioner's evidence "as a fact"* (R. 1583, 1584). Accordingly, the trial court overruled respondent's motion (R. 1584).

In keeping with respondent's concession that petitioner's work on extension went beyond June 4, 1933, respondent requested no instructions pertaining to the statute (R. 1627-1639). No errors or objections to the charge on that point were made by respondent (R. 1620). *After a verdict was returned in favor of petitioner, respondent did not file any motion for judgment n. o. v. under Rule 50(b) and did not urge at any time that a new trial be granted because of the trial court's ruling on the statute of limitations* (R. 36, 37). No reference is made to the statute in respondent's motion for a new trial (R. 36, 37). In the oral argument on the motion for a new trial that point was not presented to the trial court. In fact the statute was not mentioned in the argument (R. 1640-1649).

Rule 50(b) of the Rules of Civil Procedure provides "whenever a motion for a directed verdict made at the close of all the evidence is denied * * * the court is deemed to have submitted the action to the jury subject to a *later de-*

termination of the legal questions raised by the motion." For the obvious purpose of having the legal questions "reserved" *determined* after verdict, the rule provides that "within ten days after the reception of a verdict a party who has moved for a directed verdict may move to have the verdict and any judgment entered set aside and to have judgment entered in accordance with his motion for a directed verdict * * *." Motions for a new trial under the rule are to be filed along with the motion to set aside the verdict or a new trial may be prayed for in the alternative. Thus, if a litigant desires to reserve for appellate review a motion for a directed verdict he *must* comply with Rule 50(b) and file the motion therein prescribed to set aside the verdict and for judgment. Otherwise no "reservation" theory is available and *Slocum* v. *New York L. Ins. Co.*, 228 U. S. 364, is controlling and prevents an appellate court from directing a dismissal.

Accordingly, on the present record, the Court of Appeals incorrectly construed Rule 50(b) and exceeded its power in directing a dismissal. This Court consistently has granted certiorari to review this precise point in order than an authoritative construction of Rule 50(b) might be obtained. *Conway* v. *O'Brien*, 312 U. S. 492; *Berry* v. *United States*, 312 U. S. 450; *Halliday* v. *United States*, — U. S. — (No. 101, Oct. Term, 1941, decided January 19, 1942, United States Supreme Court Bulletin, Vol. 2, No. 13, p. 559).[7] In the *Conway*, *Berry* and *Halliday* cases this Court held the importance of a proper construction of Rule 50(b) was sufficient basis for granting certiorari, particularly as the circuit courts of appeal "are not in complete agreement," citing *Conway* v. *O'Brien*, 111 F (2d) 611, 613; *Pruitt* v. *Hardware Dealers Mut. F. Ins. Co.*, 112 F (2d) 140; *United States*

[7] And see *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, wherein this Court said (p. 247): "The importance of a decision by this court, respecting the proper practice under Rule 50(b) (use of alternative motions after verdict) under Rule 50(b), and a conflict of decisions,' (citing in footnote 4 *Pruitt* v. *Hardware Dealers Mut. F. Ins. Co.*, 112 F. (2d) 140, and eight other decisions under the rule), moved us to grant certiorari."

v. *Halliday*, 116 F (2d) 812. But *no* authoritative interpretation of Rule 50(b) was given in the *Conway, Berry* and *Halliday* cases by this Court, because there was "no occasion" so to do, since in each case there was sufficient evidence to support the verdict. So the important question (here involved) pertaining to Rule 50(b) is still open and should be decided by this Court.

3. *Respondent's conduct, as shown in the statement of the case, amounted to a waiver or abandonment of the defense of the statute of limitations or is sufficient to estop respondent from relying on the statute.* In the statement of the case will be found a summation of the evidence concerning respondent's conduct after January 1933. Respondent's conduct at the trial clearly showed a waiver or abandonment of the defense of the statute of limitations.

Even if the defense were involved, respondent's conduct after January 1933 estops it from relying on the statute. Respondent's acts not only *lulled* but *induced* petitioner to delay suit. This is so clearly the fact that it cannot be successfully denied.

It has been the law in the District of Columbia for many years that where a defendant does *anything* to *lull* a plaintiff into delaying suit he is estopped to rely on the statute of limitations. *Hornblower* v. *George Washington University*, 31 App. D. C. 64; *Drury* v. *Gorrell*, 44 App. D. C. 518. The decision below "runs head on" into the *Hornblower* and *Drury* cases.

CONCLUSION.

It is respectfully submitted that this petition for certiorari to bring before this Court the decision and judgment of the United States Court of Appeals for the District of Columbia should be granted.

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